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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY COUNCIL OF THE CITY OF CHICAGO,
Petitioner,

v.

MARS KETCHUM, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER THE CITY COUNCIL OF THE CITY OF CHICAGO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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STATEMENT

Petitioner submits this Supplemental Brief in response to the Brief for the United States as Amicus Curiae (hereinafter, the "Amicus"), which thoroughly perplexes and confuses petitioner by the inconsistent position taken by the Amicus, as it expressly acknowledges the fundamental errors in the Seventh Circuit's decision, primarily the super-majority concept, and yet asserts this Court should *not* review this fatally-flawed decision. Except for the Amicus' few conclusory statements against review of the case, the substantive discussion of the issues by the Amicus supports not only review but reversal of the Seventh Circuit's decision. As the Amicus recognizes, "This decision raises issues of great importance to enforcement of newly-amended Section 2." (U.S. Br., p. 7). Contrary to the posture assumed by Amicus concerning this Court's review of this Petition, the Amicus apparently agrees with petitioner's vigorous assertion that the Seventh Circuit's decision, in effect, rewrote Section 2 of the Voting Rights Act in an attempt to use redistricting to maximize minority strength within a legislative unit, rather than to provide minorities with an equal opportunity to participate in the electoral process as required by the express legislative intent. Clearly, review of the Seventh Circuit's decision by this Court is not only warranted, but essential, to provide lower courts with the necessary guidance in the proper application of amended Section 2.

None of the Amicus' arguments against review by this Court can withstand scrutiny. Petitioner strongly suggests that rather than providing a few reasons why certiorari should be denied, the Amicus has provided many reasons why certiorari should be granted, principally the Seventh Circuit's erroneous advocacy of the 65% guideline or "some other uniform corrective" to Section 2 cases.

ARGUMENT

I.

THE SEVENTH CIRCUIT'S DECISION IN THE INSTANT MATTER, CONTRARY TO LEGISLATIVE INTENT AND THIS COURT'S DECISIONS REGARDING SECTION 2 OF THE VOTING RIGHTS ACT, REQUIRES THIS COURT'S REVIEW.

The Amicus contends that the principal issue raised in this matter, *i.e.*, as phrased by the Amicus, "[w]hether the district court abused its remedial discretion in declining to create certain super-majority black and Hispanic wards as a remedy for a violation of Section 2 of the Voting Rights Act" (U.S. Br., p. I), *may* be satisfactorily resolved on remand, arguably obviating the need for this Court's review at this "interlocutory stage." (U.S. Br., p. 7). Petitioner fails to comprehend the Amicus' contention that if on remand the district court were to accept certain registration and turnout figures, which suggest that the registration and turnout rates for blacks are comparable to those for whites, as accurate and reliable, then no correction would be necessary.* (U.S. Br., pp. 7-8). The Amicus seems to ignore the Seventh Circuit's instruction given the district court regarding the determination of an appropriate corrective, "We note, however, that judicial experience can provide a reliable guideline to action where empirical data is ambiguous and not determinative and that a guideline of 65% of total population (or its equivalent) has achieved general acceptance in redistricting jurisprudence." (App. 33). The applicability of the 65% guideline to the instant case is strongly and extensively

* Petitioner would note herein that the district court apparently accepted the reliability of these figures for it specifically referred to them in rejecting the so-called 65% guideline. (App. 63-64).

disputed by the Amicus itself; and, in fact, the Amicus concludes the Seventh Circuit *erred* in holding that super-majority districts, *i.e.*, 65% minority, are required. (U.S. Br., pp. 9-15). Guidelines are obviously necessary should this Court take any action which would effectively remand this cause to the district court, and, under such circumstances, given the legally unsound guidelines of the Seventh Circuit, such guidelines for any remand of this cause should be established by this Court.

The Amicus' contention that the instant matter does not warrant the Court's review stands in contradiction to its recent urging of this Court's review in *Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C. 1984) (three-judge court), *prob. juris. noted, sub nom. Thornburg v. Gingles*, 53 U.S.L.W. 3776 (U.S. Apr. 29, 1985) (No. 83-1968). *Thornburg*, similar to the instant case, involves, *inter alia*, effective majorities for minority groups under Section 2. In *Thornburg*, the Amicus found that the lower court (there, the district court) had erred in "equat[ing] the legal standard of Section 2 with one of *guaranteed* electoral success in proportion to the black percentage of the population." (U.S. Br. in *Thornburg*, p. 12). The Amicus therein, as in the instant case (see Sec. III, *infra*), noted the conflict of the lower court's decision with *Brooks v. Allain*, No. 83-1865 (Nov. 13, 1984), and *Strake v. Seamon*, No. 83-1823 (Oct. 1, 1984), and stated in that regard, "This Court's summary affirmances establish that minority voters do not have a right under Section 2 to the creation of 'safe' minority-controlled districts—even where other objective factors contribute to the finding of a violation under the 'totality of the circumstances.' " (*Id.*, pp. 12-13). The Amicus concluded, as it logically should have in the instant case, "As this decision demonstrates, guidance from the Court is needed to ensure that the congressional intention will be honored in this and future cases." (*Id.*, p. 20).

II.

THE SEVENTH CIRCUIT ERRED IN DETERMINING HISPANICS ARE ENTITLED TO A GREATER SUPER-MAJORITY BECAUSE THEIR POPULATION IS SIGNIFICANTLY MADE UP OF NON-CITIZENS.

The Amicus contends that the Seventh Circuit's decision was partially correct, *i.e.*, in its finding that the district court failed to consider the extensive non-citizenship of Hispanics in evaluating political strength. (U.S. Br., pp. 7-8). Petitioner submits that the Amicus has misunderstood the Hispanic non-citizenship issue. Petitioner agrees with the Amicus' contention that "to include persons ineligible to vote on account of non-citizenship in the statistical pool would significantly overstate the degree of Hispanic 'electoral potential.' " (U.S. Br., p. 8). Petitioner further agrees that citizenship population data, just as voting age population data, would be more probative of the Hispanic "electoral potential." However, there is absolutely nothing in the Record which indicates to what extent the 14.0% Hispanic total population (11.7% voting age population) in the City of Chicago consists of *non-citizens*. Although included in the 1980 census population figures and, therefore, in the "ideal" ward population figure for redistricting purposes, the non-citizen Hispanic persons are not eligible to vote and their inclusion distorts to an unknown degree the Hispanic "electoral potential." In assessing whether a Section 2 violation occurred with respect to the Hispanic population, both the district court and the Seventh Circuit *included Hispanic non-citizens* in determining the Hispanic "electoral potential."

The Seventh Circuit directs the district court to apply an "appropriate corrective" for "non-citizenship" of Hispanics in particular areas. There can be no justification for including Hispanic non-citizens when determining the Hispanic electoral potential and then excluding them when creating Hispanic wards. The Seventh Circuit cites ab-

solutely no judicial precedent for the proposition that Hispanics are entitled to an even greater super-majority of a political unit when they are significantly made-up of non-citizens. *Certainly no decision of this Court supports that proposition*; and such a proposition has no legal justification. [*See, e.g., Rybicki v. State Board of Elections*, 574 F.Supp. 1082, at 1140, n.12 (N.D. Ill. 1983) (three-judge panel) (Grady, J., dissenting), quoted at Pet. 25.] In *Reynolds v. Sims*, 377 U.S. 533, 579 (1963), this Court wrote, "Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any *citizen* is approximately equal in weight to that of any other *citizen* in the United States." (Emphasis added). The problem with the Seventh Circuit's direction concerning the Hispanic population is that, as stated by Judge Grady in *Rybicki, supra*, it "accepts the doubtful proposition that American citizens of Hispanic extraction are entitled to have their voting power enhanced because of the presence of Hispanic aliens in the community." This important issue requires direction from this Court.

III.

THE SEVENTH CIRCUIT ERRED IN HOLDING A 65% GUIDELINE OR SOME OTHER UNIFORM CORRECTIVE AS NECESSARY TO ESTABLISH AN EFFECTIVE MAJORITY UNDER SECTION 2 OF THE VOTING RIGHTS ACT AFTER THE DISTRICT COURT, BASED UPON THE EXTENSIVE EVIDENCE PRESENTED, DETERMINED A MINORITY NEED ONLY CONSTITUTE 50% OF A WARD'S VOTING AGE POPULATION TO FORM AN EFFECTIVE MAJORITY WITHIN THAT WARD.

In *Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge panel), the court determined that the redistricting plan before it unlawfully diluted minority voting strength under *Section 2* of the Voting Rights Act, as amended, based upon the aggregate of past discrimina-

tion, racial bloc voting, and other factors. In devising a plan which did not violate *Section 2* of the Voting Rights Act, as amended, the trial court in *Jordan* stated:

> We recognize that the creation of a Delta district with a *majority black voting age population* implicates difficult issues concerning the fair allocation of political power. *See* A. Howard & B. Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615 (1983). Although the use of a race-conscious remedy for discrimination, approved by the Supreme Court in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), can come into tension with Congress' disclaimer in amended §2 of any right to proportional representation, *the plan we have adopted fully rectifies the dilution of black voting strength in the Second District and satisfies the requirements of amended §2* without achieving proportional representation for blacks in Mississippi.
>
> . . . . *In the opinion of this court, after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections.* 604 F.Supp. 807, 814. [Emphasis added].

A majority of this Court summarily affirmed the above decision of the *Jordan* three-judge court in *Mississippi Republican Executive Committee v. Brooks*, ____ U.S. ____, 105 S.Ct. 416 (1984).*

Addressing the case at issue, in determining the percentage threshold at which the protected minority has the

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* It should be noted herein that Justice Stevens in *Brooks* equated a majority voting age population with an "effective" majority. ____ U.S. ____, 105 S.Ct. 416, 417, n.4. The Seventh Circuit's decision herein expressly rejects the equating of a majority voting age population with an "effective" majority.

same opportunity as others within the ward to participate in the electoral process and to elect a candidate of their choice, the district court rejected the so-called "65% total population guideline", based upon the evidence presented at trial, including registration and turnout figures, and instead set a 50% majority voting age population as the benchmark for this case, as did the *Jordan* court.

The Seventh Circuit herein has rejected the district court's finding, *not upon the "clearly erroneous" standard,* but rather upon what it perceives should be the standard based upon national census figures, the purported historical position of the Justice Department, the purported expert opinion, and the purported history of redistricting jurisprudence. As significantly noted by the Amicus, the argument of the appellants in *Brooks, "rejected* by this Court in *Brooks,* is remarkably similar to the position adopted by the [Seventh Circuit] below—with the exception that in Chicago, unlike Mississippi, black voters have not been systematically denied their right to vote in the recent past and have greatly increased their registration and voter turnout in recent elections." (U.S. Br., p. 11, n.8). [Emphasis added].

Initially analyzing the remedy prescribed by the Seventh Circuit, *i.e.,* the 65% guideline or "some other uniform corrective" (App. 41), the Amicus antithetically asserts:

> Although we conclude that certiorari should be denied, since the Court has sought our views in this case we are bound to add that we have serious reservations, as a matter of law, about the court of appeals' view of the need for creation of super-majority black or Hispanic districts as a remedy under Section 2. The court of appeals has apparently misunderstood the position of the Justice Department and this Court, on which it relied for its 65% "guideline." (U.S. Br., pp. 9-10) (citation omitted).

In the view of the Amicus, the analysis under Section 5 of the Voting Rights Act does not apply to Section 2.

(U.S. Br., p. 10). The Amicus additionally notes two recent decisions by this Court, *Brooks v. Allain*, No. 83-1865 (Nov. 13, 1984), and *Strake v. Seamon*, No. 83-1823 (Oct. 1, 1984), and the legislative history of the amendment, which indicate super-majorities are not required as remedies for violations of Section 2, contrary to the Seventh Circuit's decision in the instant case. (U.S. Br., pp. 10-12).

In conclusion, the Amicus states:

> If the court of appeals were correct—if a 65% majority were "reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice"—then black and Hispanic voters would be entitled to 65% super-majority districts wherever they could be drawn; anything less would deny them the "opportunity" they are entitled to by law. That view (commonly denominated "proportional representation") was expressly repudiated by Congress,[14] and has been rejected by this Court. *Brooks v. Allain, supra; Strake v. Seamon, supra.* (U.S. Br., p. 15).

It is beyond petitioner's comprehension how the Amicus can doggedly state the Seventh Circuit erred on so fundamental and essential a principle to the application of Section 2 and yet contend the error does not warrant this Court's review and correction. Without this Court's review, this decision will undisputably stand as precedent in the area of voting rights, an interpretation of Section 2 which the Amicus concedes is contrary to decisions of this Court *and* the expressed legislative intent.

Though finding serious errors in the Seventh Circuit's opinion, the Amicus nonetheless contends the issue remains whether the district court abused its discretion in the remedy it ordered and concludes, at this juncture, a determination of whether the Seventh Circuit erred in finding the district court's remedy inadequate would be difficult. (U.S. Br., p. 15). Though the Amicus concedes that only the question of the appropriate remedy, not the

specifics of the Section 2 violation itself, is before this Court, it disagrees with the district court's belief that "the totality of the circumstances" analysis refers to the whole plan, rather than individual wards.* (U.S. Br., pp. 16-17). However, the Amicus' argument puts form over substance, for although the district court looked at the entire plan and, *on the basis of the evidence presented to it,* concluded the drawing and adopting of the 1981 map was motivated by the desire to preserve the positions of the incumbent aldermen, rather than by racial discrimination (App. 47), it nonetheless found 50% of the voting age population to be an effective majority within the individual wards and devised a remedy accordingly, just as was done by the district court in *Brooks, supra.*

Additionally, the Amicus criticizes the district court for basing its finding of a Section 2 violation on retrogression, again, an analysis Amicus contends is appropriate under Section 5, rather than Section 2, and comments that on review the Seventh Circuit did not precisely define the violation. The Amicus suggests that on remand the district court may change its violation analysis and, therefore, the Amicus deems review of the remedy premature at this point. (U.S. Br., pp. 18-19). However, this view overlooks the fact that even if the district court's analysis of the Section 2 violation were flawed, which petitioner denies, the Seventh Circuit remanded only for reconsideration of the Section 2 remedy itself, and that reconsideration, if this Court denies review, will be premised upon the Seventh Circuit's espousal of the 65% guideline, *i.e.*, the imposition of super-majorities, which the *Amicus admits would be erroneous.* To allow a remand to the district court at this time with the only guidance being that of the Seventh

* Adding to the confusion raised by the Amicus' brief is the fact that the Amicus, a plaintiff-intervenor which participated actively before the district court, *chose not to appeal the district court's decision,* which it now, over two years later, contends is flawed.

Circuit's erroneous decision is to invite further and aggravated error. This Court's direction is direly needed.

Finally, petitioner notes that if one considers the issue presented, *as stated by the Amicus, i.e.*, "[w]hether the district court abused its remedial discretion in declining to create certain super-majority black and Hispanic wards as a remedy for a violation of Section 2 of the Voting Rights Act" (U.S. Br., p. I), the answer based upon the argument of the Amicus is clear. As the district court was not required to create super-majority minority wards, a proposition with which the Amicus agrees, the district court could not possibly have abused its discretion in refusing to do so.

CONCLUSION

This Court has noted probable jurisdiction of the critical issues in this case in *Thornburg v. Gingles, prob. juris. noted,* 53 U.S.L.W. 3776 (U.S. Apr. 29, 1985) (No. 83-1968).

If this case were remanded, the district court would have to await guidance from this Court in *Thornburg*, notwithstanding the Seventh Circuit's decision and direction on remand. And if the decision in *Thornburg* is consistent with the recent summary affirmances, the district court on remand would merely affirm the plan in place.

Petitioner can perceive no reason in logic or the law to refuse review of this case.

Respectfully submitted,

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